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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

DEC 21 1994

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of )  
 )  
Implementation of Sections 3(n) and 322 )  
of the Communications Act )  
 )  
Regulatory Treatment of Mobile Services )

GN Docket No. 93-252

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To: The Commission

**PETITION FOR RECONSIDERATION**

E.F. Johnson Company ("E.F. Johnson" or the "Company"), by its attorneys, pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("FCC or "Commission") hereby submits its Petition for Reconsideration of the Third Report and Order adopted in the above-referenced proceeding<sup>1/</sup> by which the Commission implements Section 3(n) and 322 of the Communications Act of 1934,<sup>2/</sup> as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993.<sup>3/</sup>

**I. INTRODUCTION**

E.F. Johnson is a leading designer and manufacturer of radio communications and specialty communications products for commercial and public safety use. Founded over seventy years ago as an electronic components manufacturer, E.F. Johnson entered the radio

<sup>1/</sup> Implementation of Sections 3(n) and 322 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 59 FR 59945 (1994) "Third Report and Order").

<sup>2/</sup> Communications Act of 1934, 47 U.S.C. Section 151-713.

<sup>3/</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI Section 6002(b), 107 Stat. 312,392 (1993).

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communications equipment market in the late 1940's and is one of the three largest providers of land mobile radio systems in the United States. It produces base stations, vehicular mounted and portable transmitters that operate in various portions of the radio spectrum that are used by a variety of entities requiring communications capabilities. The Company manufactures products used by, among others, SMR licensees in the provision of dispatch services.

In the Third Report and Order the Commission concludes, among other things, that all commercial mobile radio services ("CMRS")<sup>4/</sup> are substantially similar and should therefore be subject to comparable technical and operational rules. The Commission reached the conclusion that mobile services will be treated as substantially similar, and be subject to comparable technical and operational rules because they all compete against each other. Treating all mobile services providers as substantially similar may have a significant impact on traditional "local" SMR licensees. These licensees will be subject to the more burdensome requirements imposed on common carriers. Moreover, the Commission recently initiated a rule making proceeding which would completely revise the regulatory structure for local SMR systems, based upon the presumption that these systems are substantially similar to other CMRS providers.<sup>5</sup> However, if the services offered by these local SMR licensees are not substantially similar, neither full common carrier regulatory nor completely revised regulatory treatment is warranted.

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<sup>4/</sup> The Commission defines CMRS as all mobile services that are for profit and that provide interconnected service to the public or a substantial portion of the public. The Commission found that all common carrier mobile licensees and certain private radio licensees in the Specialized Mobile Radio ("SMR"), Business Radio, 220-222 MHz, and private paging services, regulated under Part 90 of the Commission's rules, fall under the CMRS classification. See Implementation of Sections 3(n) and 322 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1448-58 (1994).

<sup>5</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, P.R. Docket No. 93-144, Further Notice of Proposed Rule Making, Released November 4, 1994 (FCC 94-271) ("Further Notice").

E.F. Johnson is a major manufacturer and distributor of products to this segment of the telecommunications industry. Thus, the rules adopted as a result of the Third Report and Order will affect the Company's ability to sell its products. Moreover, the Company supports a network of over 600 dealers nationwide. Many of its dealers also offer local SMR service or other CMRS. Accordingly, treatment of any CMRS licensees as substantially similar will have a negative impact on these entities as well.

On October 27, 1994, the Department of Justice ("DOJ") filed a Complaint in the United States District Court for the District of Columbia (the "Court") to block Nextel Communications, Inc.'s ("Nextel") acquisition of Motorola, Inc.'s ("Motorola") SMR assets.<sup>6/</sup> The DOJ found, among other things, that traditional SMR services are a distinct and separate market from the provision of mobile telephone communications services typically offered by cellular carriers. This finding is directly contrary to the Commission's conclusion in this proceeding. Accordingly, based upon the findings of the DOJ, E.F. Johnson respectfully submits the following Petition for Reconsideration of the Third Report and Order.

## II. DISCUSSION

In the Third Report and Order, the Commission specifically dismisses the argument that "customers desiring conventional interconnected SMR dispatch services would not be likely to subscribe to cellular service as a substitute," saying that it "does not comport with the realities of the marketplace . . . and . . . is not consistent with antitrust principles."<sup>7/</sup> In its civil action, however, the DOJ submitted a Competitive Impact Statement in which in which it characterized

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<sup>6/</sup> U.S. V. Motorola, Inc. & Nextel Communications, Inc.; Proposed Final Judgment and Competitive Impact Statement, 59 FR 55705 (1994).

<sup>7/</sup> Third Report and Order at para. 57.

the traditional SMR market as a distinct product market from the cellular telephone service market.<sup>8/</sup> The DOJ specifically stated that cellular telephone service is not a substitute for traditional SMR dispatch services.<sup>9/</sup>

The traditional SMR market includes providers' ability to offer interconnected as well as dispatch service. The Commission has permitted SMR licensees to offer interconnected service for many years. Accordingly, the relevant distinction between markets is not the provision of telephone interconnect service. The relevant distinction between markets, as the Company has argued in the past, and as the DOJ now confirms, is between local communications providers, covering a limited geographic area usually with one transmitter and wide area, mobile telephone providers employing frequency reuse, such as cellular licensees and wide area SMR licensees.

As the Company has noted in the past, there is a significant difference in the type of service that local SMR systems and wide area SMR systems (including cellular and broadband PCS systems) can efficiently provide. Local SMR systems are authorized for a limited number of channels and consequently cannot employ frequency reuse techniques. It is the aggregation of sufficient spectrum that allows 800 MHz wide area SMR providers to employ frequency reuse, creating the capacity that enables those systems to offer services that will be similar to those offered by cellular and PCS operators. However, it is that same frequency reuse that makes it inefficient for PCS and cellular licensees to offer traditional local SMR service. These frequency reuse systems must employ the use of at least one channel in each cell, thereby requiring dozens of channels, in order to make a dispatch or fleet call; traditional local SMR systems require only one channel to provide the same service. When compared to local SMR systems, which provide

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<sup>8/</sup> 59 FR 55705 at 55709.

<sup>9/</sup> Id.

efficient dispatch and fleet call capabilities, the employment of a PCS or cellular system to make a dispatch or fleet call, is spectrum inefficient. These systems are designed, and the DOJ found that they do, in fact, serve distinct market segments. Accordingly, the regulatory structure for both trunked and local SMR systems should not be substantially similar to wide area SMR, cellular or PCS systems.

In the Third Report and Order, the Commission relies on the findings of the DOJ with regard to antitrust principles in assessing the similarity of various CMRS services.<sup>10/</sup> Thus, the DOJ's finding that the cellular and traditional SMR dispatch markets are distinct product markets contradicts the Commission's decision to treat them as substantially similar. The Commission also relies on the Supreme Court's decision in United States v. Continental Can in determining that "reasonable conclusions and expectations regarding customer demand and technological innovation support" the conclusion that all CMRS services are substantially similar and part of the same product market.<sup>11/</sup>

The Third Report and Order was adopted August 9, 1994, almost two months before the DOJ filed the Competitive Impact Statement in which it stated that "[c]ellular telephone service is not a substitute [for trunked SMR service] because it is significantly more expensive than SMR service, is significantly more difficult for customers to restrict communications to a defined fleet or group, and because it cannot be provided on a one-to-many dispatch basis."<sup>12/</sup> This statement directly contradicts the Commission's conclusion that all CMRS services meet the same customer needs in different ways and therefore can be viewed as competing against each

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<sup>10/</sup> Third Report and Order at paras. 44-47.

<sup>11/</sup> Id. at 65-68.

<sup>12/</sup> 59 FR 55705 at 55709.

other.<sup>13/</sup> Rather, cellular services and traditional SMR services offer consumers distinct products to meet different needs. Because the Commission found the DOJ guidelines and antitrust principles instrumental in making its determinations in the Third Report and Order, the recent findings of the DOJ, the expert governmental authority in this area, must be considered and the Commission must reevaluate its decision that all CMRS services are substantially similar.

Specifically, the Commission should accord different regulatory treatment to mobile telephone-like services and local SMR services. This different treatment will have a significant impact upon the future licensing of local SMR systems. In particular, the Commission should refrain from promulgating regulations as a result of the Further Notice in the Docket No. 93-144 proceeding. As the Commission noted in the Further Notice, the proposed rules are a direct outgrowth of its findings in the Third Report and Order. Because the Commission's conclusions in the Third Report and Order, as demonstrated above, are flawed, any decision adopted as a result of the Further Notice would be similarly incorrect.

### **III. CONCLUSIONS**

The Commission concluded that all CMRS services are substantially similar prior to the DOJ's contrary conclusion. Accordingly, the Commission should reclassify the wide area mobile telephone and traditional SMR markets as distinct product markets in accordance both with the DOJ's findings and the Company's proposal, contained in its Comments and Reply Comments in this proceeding. As a result, the regulatory structure of local SMR systems should remain the same. The Commission should not, as it has proposed in the Docket No. 93-144 proceeding,

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<sup>13/</sup> Third Report and Order at para. 59.

adopt regulations that would accord similar regulatory treatment to wide area and local SMR systems.

**WHEREFORE, THE PREMISES CONSIDERED,** E.F. Johnson Company hereby submits the foregoing Petition for Reconsideration and urges the Commission to reconsider its newly-adopted rules consistent with the foregoing.

Respectfully submitted,

**E.F. JOHNSON COMPANY**

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